

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

JOHN BAX,

Petitioner,

vs.

FILED

WARDEN, FCI MCKEAN,

CLERK
U.S. DISTRICT COURT
Respondent

'06 SEP -6 11:02 C.A. No. 05-194 Erie
District Judge McLaughlin
Magistrate Judge Baxter

MOTION FOR RECONSIDERATION

NOW COMES, Petitioner John Bax, pro-se, and moves this Honorable Court, pursuant to Local Rule 7.1(g), and Rule 59(e), Fed. R.Civ.P., for reconsideration of this Court's order dismissing the writ of habeas corpus. In support, the following is submitted.

1. On July 27, 2006, Magistrate Judge Baxter issued her Report and Recommendation to this Court for consideration.

2. Petitioner received his copy of the report and recommendation on August 1, 2006. His response was therefore due on August 11, 2006, ten (10) days from his receipt of the report and recommendation. See Local Rule 72.1.4B.

3. Petitioner moved the Court for an extention of time within which to file his objection to the R&R, up to and including August 18, 2006. This Court granted his motion.

4. Pursuant to prison policy for mailing legal mail, on August 16, 2006, Petitioner conveyed his opposition to the R&R to prison authorities for mailing with first class postage, pre-paid, and properly addressed to this Court and AUSA Christy Wiegand.

5. On August 22, 2006, this Court entered an order adopting the R&R, and dismissing the habeas petition for lack of subject matter jurisdiction.

6. Reconsideration is appropriate where a palpable defect

exist and correcting the error prevents a manifest injustice. Specifically, "[t]he key to success on a motion [for reconsideration] is to show that there were facts or legal issues properly presented but overlooked by the court in its decisions." Blue Mountain Mushroom Co. v. Monterey Mushroom, 246 F.Supp.2d 394, 398-99 (E.D. Pa. 2002); E.D.Pa. 7.1(g) cmt. 6.b (citing Marriott Senior Living Servs. v. Springfield Twp., No. Civ.A. 97-3660, 2000 WL 1781937 (E.D. Pa. 2000)).

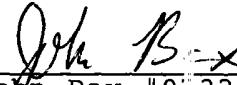
7. Here, Petitioner's objections to the R&R were conveyed to prison authorities on August 16, 2006, well before the August 18, 2006, filing deadline. See Ex. A. Under the mailbox rule announced in Houston v. Lack, 487 U.S. 266 (1988), a prisoner legal materials are considered filed on the date they are conveyed to prison authorities for mailing.

8. Moreover, because his objections were timely filed, Petitioner is entitled to consideration of his legal issue by an Article III, Judge. See Art. III, U.S. Const.

C O N C L U S I O N

WHEREFORE, for the reasons above, Petitioner respectfully request this Honorable Court vacate its judgment and reconsider the issues reported in the magistrate judge's R&R, based on the merits of the claims presented.

Date: 9-28-06


 John Bax #07328-067
 Petitioner/pro-se
 FCI McKean
 P.O. Box 8000
 Bradford, Pa 16701

CERTIFICATE OF SERVICE

The undersigned certifies that on the date below a true and correct copy of the foregoing was conveyed to prison authorities for mailing with First Class U.S. Postage prepaid and properly addressed to the following party:

Christy Wiegand
Assistant U.S. Attorney
U.S. Courthouse & Post Office
700 Grant Street, Suite 400
Pittsburgh, PA 15219

Date: 8-28-06

John Bax
John Bax 07328-067
Petitioner/Pro-se
FCI McKean
P.O. Box 8000
Bradford, PA 16701

August 28, 2006

John Bax #07328-067
FCI McKean
P.O. Box 8000
Bradford, PA 16701

Office of the Clerk
U.S. District Court
Western District of Pennsylvania
227 U.S. Courthouse
P.O. Box 1820
Erie, PA 16507

Re: John Bax v. Warden, FCI McKean:
C.A. No. 05-194 Erie
District Judge McLaughlin
Magistrate Judge Baxter

Dear Clerk:

Enclosed for filing please find the original of Petitioner's "Motion For Re-consideration" with attachments and Certificate of Service.

Your assistance is greatly appreciated.

Sincerely,



cc: file
: dnr/jc
: AUSA Wiegand
: enclosure

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN BAX,
Petitioner,
v.
WARDEN, FCI MCKEAN,
Respondent.

Civil Action No. 05-194 Erie

MEMORANDUM ORDER

This habeas corpus action was received by the Clerk of Court on June 22, 2005, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation [Doc. No. 17], filed on July 27, 2006, recommended that Petitioner's Petition be dismissed for lack of subject matter jurisdiction and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on Petitioner by certified mail and on Respondent. Petitioner was subsequently granted an extension until August 18, 2006 in which to file objections [Doc. No. 19]. No objections were filed. After *de novo* review of the petition and documents in the case, together with the Report and Recommendation, the following order is entered:

AND NOW, this 22nd day of August, 2006;

IT IS HEREBY ORDERED that the Petitioner's Petition for Writ of Habeas Corpus is DISMISSED for lack of subject matter jurisdiction and a certificate of appealability is DENIED.

The Report and Recommendation [Doc. No. 17] of Magistrate Judge Baxter, filed on July 27, 2006, is adopted as the opinion of the Court.

s/ Sean J. McLaughlin
United States District Judge

cm: All parties of record

JOHN BAX #07328-667
FCI MCKEAN
P.O. BOX 8000
BRADFORD, PA 16701

F.O. BOX 5005
BRADFORD, PA 16701

105 2.3

LEGAL MAIL

INSUFFICIENT ADDRESS
ATTEMPTED NOT KNOWN
NO SUCH NUMBER/STREET
NOT DELIVERABLE AS ADDRESSED
REDIRECTED FORWARD

ATTENTION: DO NOT DESTROY
(ADDRESS SEE REVERSE SIDE OF CARD)

8-21-00